
U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

DATE: October 1, 1991

CASE NO: 89-ERA-00012

IN THE MATTER OF:

FRANK C. SMITH,
Complainant

v.

TENNESSEE VALLEY AUTHORITY,
Respondent

APPEARANCES:

W.P. BOONE DOUGHERTY, Esq.
For the Complainant

HELEN de HAVEN, Esq.
BRENT R. MARQUAND, Esq.
For the Respondent

BEFORE:

Richard E. Huddleston
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under § 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1982), as amended ("ERA"), and the implementing regulations at 29 C.F.R. Part 24. The ERA, in § 5851(a), prohibits a Nuclear Regulatory Commission ("NRC") licensee from discharging or otherwise discriminating against an employee who has engaged in protected activities as set forth in the Act. The Complainant seeks to establish that the Tennessee Valley Authority (TVA), his former employer, took adverse

personnel action against him in retaliation for his expression of nuclear safety concerns, activity which is protected under the ERA.

[Page 2]

This case was assigned to this Administrative Law Judge on December 22, 1988. By telephone calls on December 22 and 23, 1988, Counsel for both parties advised that additional time was necessary for discovery, possible settlement discussions, and to prepare for a hearing. The parties also agreed that due to the similarity of issues and facts, the complaints of *Robert D. Brock v. TVA* and *Frank C. Smith v. TVA* should be consolidated for trial.[1] On January 13, 1989, the parties waived the time limitations set out in 29 C.F.R. Part 24. Upon notice issued February 15, 1989, a formal hearing was conducted on May 8, 9, 10, 11, and 12, 1989, in Knoxville Tennessee. The hearing could not be completed during that time and, by agreement of the parties, the hearing resumed in Dalton, Georgia, on May 31, and June 1 and 2, 1989. Again, by agreement the hearing was suspended, resumed, and completed on July 10, 11, 12, 13, and 14, 1989, in Knoxville, Tennessee. The record was held open for briefs, with several agreed extensions of time by both parties. Briefs were filed on October 19, 1989, by the Respondent and on October 20, 1989, by the Complainant.

The record upon which this case is decided consists of Complainant's Exhibits Nos. 1 through 122;[2] Respondent's Exhibits Nos. 1 through 71; and, Joint Exhibits Nos. 1 and 2; and the Transcript of testimony. It is noted that CX 84 was rejected (Tr. 1457); CX 111, 112, and 115 were identified but not offered into evidence; RX 40 and 41 were identified but not offered into evidence; RX 45 was identified but later withdrawn; and, RX 61 was rejected, but retained as an offer of proof (Tr. 2907-2914).

Additionally, I have marked for identification all additional documents in the formal file, including notices, orders, motions, and correspondence as Administrative Law Judge Exhibits Nos. 1 through 26.

ISSUES

1. Whether the complaint is timely filed under § 5851(b)(1) of the ERA.
2. Whether the Respondent waived its right to raise the issue of the timeliness of the complaint.
3. Whether the statute of limitations should be equitably tolled due to misrepresentation of the time limits by the Respondent.

[Page 2]

4. Whether the Complainant has engaged in activity which is protected under the ERA.
5. Whether the Complainant was the subject of retaliation for protected activities by his inclusion in the notice of reduction in force received on August 2, 1988.

6. Whether the Complainant was the subject of retaliation for protected activities by not being selected for the position of Site Security Manager at Watts Bar Nuclear Plant on September 26, 1988.

Timeliness of Complaint

The Complainant, Frank C. Smith, filed a complaint with the U.S. Department of Labor (DOL), on October 27, 1988, alleging that he was terminated from employment during a reduction in force (effective September 30, 1988) "in retaliation for his disclosure and reporting of serious safety problems at the Watts Bar Nuclear Plant and within TVA's overall safeguards security program" (CX 72).

On May 8, 1989, at 12:30 p.m., Counsel for TVA filed a motion to dismiss the complaint of Mr. Smith on the grounds that it is barred by the statute of limitations (Tr. 102-104; ALJ-17). In support of the motion, Respondent argues that Mr. Smith received official notice of his termination due to RIF on August 1, 1988, and that the termination was effective on September 30, 1988. Thus, the Respondent argues that the complaint filed on October 27, 1988, was filed more than 80 days after the Complainant received notice of the RIF. It is argued that this filing is outside of the "within thirty days after such violation occurs" provision of 42 U.S.C. § 5851(b)(1).

The Complainant responds that he filed his 210 complaint within 30 days following September 30, 1988, the effective date of his RIF. However, it is argued that the complaint should be considered timely for several reasons (Complainant's brief, page 15).

First, it is argued that the acts of discrimination against the Complainant were a pattern of continuing acts occurring from at least February 1988, and thereafter. It is argued that there were further acts of discrimination against the Complainant during the period between August 2, 1988, and September 30, 1988. Specifically, it is argued that the selection process for the position of Manager of Site Security did not culminate until approximately September 26, 1988, and that clearly Mr. Smith's complaint is filed within 30 days of that action. (Complainant's brief, page 15).

Second, it is argued that the time limitations under the ERA should be equitably tolled. It is argued that Robert Brock was advised by Attorney Wendall L. Payne that he could take no action until after the effective date of the RIF (September 30, 1988); that Mr. Brock consulted with Mr. Smith on this matter, and, that both Brock and Smith relied upon this advice, and in this context, were actively misled by such. It is also argued that Mr. Brock was advised by Mr. Alan Gentry of TVA Employee Concerns that the 30-day filing period for a Section 210 complaint commenced with the effective date of the RIF on September 30, 1988, and that both Brock and Smith relied upon this advice, and in this context, were actively misled by such. Thus, it is argued that the statute of limitations should be equitably tolled both as a result of the advice received from Attorney Payne (private counsel) and Mr. Gentry (of TVA). (Complainant's brief, page 16).

Finally, the Complainant argues that TVA waived its right to object to the complaint on the basis of timeliness. It is argued that Counsel for the parties were required in this action to file pre-hearing submissions setting forth witnesses, their proposed testimony, as well as issues involved; and, that TVA did not raise this issue until lunch time during the first day of trial. (Complainant's brief, page 17).

The ERA requires that a complaint must be filed "within thirty days after such violation occurs." 42 U.S.C. § 5851(b)(1) (1982). Clearly, the complaint filed on October 27, 1988 (CX 72), was filed more than thirty days after the Complainant received notice of the RIF. The United States Supreme Court has ruled in cases arising under Title VII of the Civil Rights Act, 42 U.S.C. § 2000, *et seq*. (1982), that the statute of limitation for filing a discrimination complaint runs from the date that the employee received notice of the adverse employment action, and not from the date on which the effects of that action are felt. *Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The opinions of the Supreme Court in *Chardon* and *Ricks* have been expressly held applicable to proceedings arising under the ERA. *Nunn v. Duke Power Company*, 84 ERA 27, 1 OAA 4, p. 261 (SOL July 30, 1987);[3] *English v. General Electric*, 85 ERA 2, 1 OAA 1, p. 195 (SOL January 20, 1987).

Mr. Smith received his notice of RIF on August 2, 1988, effective September 30, 1988, and his last employment with TVA was on September 30, 1988. However, the Complainant has argued and considerable evidence was produced to show that the failure to select Mr. Smith for the position of Site Security Manager at Watts Bar is the result of unlawful animus as a

---

result of his protected activities. This selection process was not completed until September 26, 1988. Thus, the complaint which was filed on October 27, 1988, was filed on the 30th day after this alleged adverse employment action. Therefore, I find that the complaint of Frank Smith is timely filed.

Waiver of Time Limitation

The Complainant has also argued that TVA waived its right to object to the complaint on the basis of timeliness by not raising the issue until noon after the first day of trial. As the issue of whether there is a timely complaint is of considerable importance and may be subject to consideration on appeal, I will also address this issue.

There is no provision within the ERA or 20 C.F.R. Part 24 of the regulations which addresses when a party must raise the issue of the 30-day time limitation. Federal Rule of Civil Procedure 8(c) provides that, a party shall, in its pleading, set forth affirmatively... statute of limitations... or any other matter constituting an avoidance or affirmative defense. Although not specifically stated in the rule, the Courts have held that affirmative defenses are waived if not pleaded. See, *Dole v. Williams Enterprises, Inc.*, 876 F.2d 186

(D.C. Cir. 1989), citing 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1278 (1969 & Supp. 1986), a failure to plead an affirmative defense generally results in the waiver of that defense and its *exclusion from the case* (emphasis in original).

The Second Circuit in *Davis v. Bryan*, 810 F.2d 42 (2d Cir. 1987), determined that the statute of limitations was an affirmative defense that must be asserted in the party's responsive pleading "at the earliest possible moment" and is a personal defense that is waived if not promptly pleaded. Likewise, the Sixth Circuit (where this case arises) has stated that a defense based upon the statute of limitations is waived if not raised in the first responsive pleading or in a timely fashion. *Haskell v. Washington Twp.,* 864 F.2d 1266 (6th Cir. 1988).

A defendant may amend his pleading to include an affirmative defense by leave of court. It is within the discretion of the court to permit the amendment of the pleading when it will promote the presentation of the merits of the action, the adverse party will not be prejudiced by the sudden assertion of the defense, and will have ample opportunity to meet the issue. Federal Rule of Civil Procedure 15. However, it is not an abuse of discretion to deny defendant's motion to amend their answer to include an affirmative defense just before trial. *E.E.O.C. v. White & Sons Enterprises*, 881 F.2d 1006 (11th Cir. 1989). (Here the trial court Judge stated, and the Circuit Court opinion quotes, that defendant had a duty to raise affirmative

---

defense at least by pretrial conference, otherwise the other party suffers prejudice).

In the instant case, a Notice of Hearing and Prehearing Order was issued on February 15, 1989 (ALJ-6). In that prehearing order the Complainant was directed to submit, within 20 days, a prehearing statement of position, and the Respondent was directed to file a response within 20 days thereafter. This order included (among other things) the requirement that the parties set forth the issues involved in the proceeding and the remedy requested. However, the Complainant did not file his response to the order until April 18, 1989 (ALJ-12). The Respondent filed its response on May 4, 1989, (ALJ-16). The Respondent's May 4th response did not raise the issue of timeliness. It is undisputed that the Respondent first raised the issue of timeliness by filing a motion to dismiss at noon of the first day of trial, May 8, 1989 (ALJ-17). However, May 8, 1989, was the 20th day after the Complainant's prehearing statement was filed. Upon receipt of the Respondent's motion to dismiss, the parties were permitted to argue and present evidence relevant to the timeliness of the complaint. (See, Tr. 102).

Thus, although it is true that the Respondent did not raise the issue of timeliness in its response to the Complainant's prehearing statement, the issue was raised within 20 days of that statement. As the Complainant's statement was, itself, filed late, I find that TVA's response, including the May 8, 1989, motion to dismiss, was timely filed. Further, I find that the parties were subsequently allowed to fully argue and present evidence relating to

the motion during the course of the trial. As such, I reject the Complainant's argument that the issue was waived by the Respondent.

Equitable Tolling

Assuming, *arguendo*, that I had not found the complaint timely, Complainant has also argued that the statute of limitations should be equitably tolled. The 30-day statute of limitations has been held not to be a jurisdictional bar, and thus, the limitation may be equitably tolled. *See, Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385 (1982); School District of Allentown v. Marshall, 657 F.2d 16 (3rd Cir. 1981); and, *Dartey v. Zack Co.*, 82-ERA-2, slip op. of SOL (April 25, 1983).

In order to obtain equitable relief from the statute of limitations, the Complainant must establish that (1) the Respondent has actively misled the Complainant respecting the cause of action, (2) the Complainant has in some extraordinary way been prevented from asserting his or her rights, or (3) the Complainant has raised the precise statutory claim in issue, but has

---

[Page 7]

mistakenly done so in the wrong forum. *School District of Allentown, supra.*

I reject the assertion that Complainant was actively misled by "bad advice" from a private attorney. Such misrepresentation may be civilly actionable against the attorney involved. However, such clearly cannot be held against the Respondent, and cannot be held to be sufficient to establish that the Respondent actively misled the Complainant.

However, the evidence clearly establishes that Mr. Alan Gentry, and possibly others, within the Employee Concerns division of TVA, advised Mr. Robert Brock that the 30-day time limitation did not begin to run until the effective date of a RIF, as opposed to the date of the notice of RIF (Tr. 1599). Further, the Respondent has conceded that "its Employee Concerns representatives appear to have informed complainants that they had 30 days from the effective date of their RIF in which to complain." (Respondent's brief, page 107, footnote 72). Mr. Smith testified that he and Mr. Brock were talking on a fairly regular basis concerning his situation at that point in time (Tr. 3291), and that Mr. Brock advised him that there was a 30-day time period to file a complaint after the RIF.

Mr. Smith also testified that he was told by Ms. Carol Merchant of the Department of Labor[4] in Knoxville, Tennessee, that there was a 30-day time limit from the effective date of the RIF (Tr. 3292). Ms. Merchant was not called to testify as a witness, and there is no evidence in the record to rebut Mr. Smith's testimony regarding this conversation.

Similarly, Mr. Smith had a conversation with Gerald Brantley, Mr. Gentry's supervisor at TVA Employee Concerns, 14 or 15 days after the RIF, that he had a 30-day time limit (Tr. 3293). Mr. Brantley confirmed in his testimony that he had a conversation with Mr.

Smith on October 14, 1988, relating to Mr. Smith being RIFed, because he had been supporting his trainers who had raised issues regarding the EASI calculations (Tr. 1484). However, he was not asked about any advice he may have given to Mr. Smith regarding time limits to file a complaint under Section 210 of the Act. Thus, the testimony of Mr. Smith as to this conversation is unrebutted.

Respondent has argued that there is no evidence that this incorrect information from TVA Employee Concerns representatives was deliberate misrepresentation, and thus, cannot be the basis for equitable tolling. (Respondent's brief at page 107, footnote 72).

I agree that there is no evidence that this "misinformation"

---

was deliberate. Clearly, Mr. Gentry testified that it was his understanding (even at the time of this hearing) that the time limit did not begin to run until the Complainant no longer had a job, and that, "Up until that point they are just having a piece of paper in their hand that says it's our intention that you will not have a job as of this point and time. To qualify to be in the realm of the Department of Labor's jurisdiction an adverse action has to take place" (Tr. 1599).

However, to show that a complainant was "actively misled," it is the distinction between "omission" and "commission" which is important. It is not necessary to establish that the Respondent intentionally misrepresented the facts or that there was malice. Thus, in order to show that a complainant was actively misled, I find that it is sufficient to show that incorrect information relating to the 30-day limitation was given by an employer, upon which the employee relied to his detriment, resulting in a delayed filing.

I found Mr. Smith's testimony to be highly credible, and his testimony regarding the advice he received from Mr. Brantley regarding the ERA time limits is unrebutted. However, that advice occurred on October 14, 1988, more than 30 days after Mr. Smith received his August 2, 1988, notice of RIF. Although it is clear that Mr. Smith received erroneous information from Mr. Brantley, it is after the time limitation would have expired on the notice of RIF. Thus, I find that Mr. Brantley's incorrect advice alone could not be the basis for tolling of the limitation from the date of the RIF notice. I do find that Mr. Brantley's advice would be sufficient evidence to toll the limit for filing a complaint regarding any adverse action less than 30 days prior to October 14, 1988. Thus, had the complaint been filed more than 30 days after the September 26, 1988, selection of the Watts Bar Site Security Manager, I find that Mr. Brantley's advice would toll the statue of limitations.

There is no direct evidence in the record that Mr. Smith was told of Mr. Gentry's statement to Mr. Brock. However, Mr. Brock and Mr. Smith were talking on a fairly regular basis, and had specific discussions about the time limits. As the cases of Mr. Brock and Mr. Smith were consolidated for trial, both have been throughout the record,

more or less, "painted with the same brush." Even Counsel for the Respondent conceded in their brief that "its Employee Concerns representatives appear to have informed complainants that they had 30 days from the effective date of their RIF in which to complain." (Respondent's brief, page 107, footnote 72). Further, it is unrebutted that Mr. Smith was advised by Carol Gentry of DOL that he had

---

30 days after the effective date of the RIF to file a complaint.

Upon consideration of the evidence, I find that Mr. Smith relied upon the advise of the Department of Labor, and that it is reasonable to conclude that he also relied upon the advice of Mr. Gentry of TVA, and that such has essentially been conceded by the Respondent. Therefore, I find that the statute should also be equitably tolled even from the actual date of Mr. Smith's RIF notice, and the motion to dismiss on that basis is denied.

Merits of the Complaint

The Complainant bears the burden of proof that he has been unlawfully discriminated against with respect to the terms of his employment as a result of engaging in activities which are protected under the Act. In order to establish a *prima face* case of discrimination under the ERA, the Complainant must show, by a preponderance of the evidence, that the Respondent is an employer subject to the Act; that he was an employee of Respondent under the Act; that he was discharged or otherwise discriminated against with respect to the terms, conditions, or privileges of his employment; that he engaged in activity protected by the ERA; and, that any adverse employment action was motivated, at least in part, by his protected activity. See, generally, *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983); *Makowiak v. University Nuclear Systems, Inc*., 735 F.2d 1149 (9th Cir. 1984).

The Court in *DeFord* holds that once the Complainant offers evidence from which the inference of illegal discrimination could be drawn, the Respondent then has an opportunity to show that the actions it took with respect to the Complainant were based upon legitimate nondiscriminatory reasons.

It is not disputed that TVA, as a licensee of the Nuclear Regulatory Commission, is an employer subject to the Act; that Frank C. Smith was employed by TVA at the Watts Bar Nuclear Plant; and, that Mr. Smith was terminated from TVA's employment during a reduction-in-force effective September 30, 1988.[5]

Protected Activity

The ERA provides in § 5851(a) that no employer shall discriminate against an employee who:

[Page 10]

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A § 2011 *et seq*.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or,
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 *et seq*.].

Under § 5851, protected activity may be the result of complaints or actions with agencies of the federal or state governments, or it may be the result of purely internal activities, such as internal complaints to management. See, *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159 (9th Cir. 1984); *Wells v. Kansas Gas and Electric Co*., 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 106 Sup. Ct. 1311 (1986).[6] *Contra, see Brown and Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). The Secretary of Labor has subsequently held that internal complaints do constitute protected activity even in cases arising out of the United States Court of Appeals for the Fifth Circuit, citing the denial of *cert*. in *Wells, supra*.

The Complainant argues generally that the particular issues reported by the Complainant, while not dealing directly with hardware safety at the TVA nuclear plants, do clearly deal with the safety and protection of TVA's nuclear facilities from terrorist attack. (Complainant's brief, page 3). The Respondent challenges whether the Complainant has engaged in any protected activity under the ERA (Respondent's brief, pages 14-52), by arguing the factual issues of each allegation.

However, Respondent has not challenged the issue of whether concerns relating to physical protection of a nuclear plant as opposed to "hardware" nuclear issues may be protected activity under the ERA. I am aware of no opinion of the Secretary of Labor or the Courts which has addressed this precise issue. Generally, "whistleblower" complaints which arise under the ERA relate to the physical construction or operation of a nuclear facility. However, as this has not been argued by the Respondent, I will not discuss it further, except to conclude that concerns expressed about physical protection or physical safety of a nuclear plant may constitute protected activity under the ERA.

[Page 11]

Mr. Smith argues that he was involved in protected activities by his support for his subordinate, Mr. Brock, concerning the definition of response force time as used in the EASI model (Tr. 1067; Complainant's brief, pages 3-6). As indicated earlier, the complaint filed by Mr. Brock has been settled by the parties, and is not in issue here.

Clearly, the merits of Mr. Brock's concern relating to EASI and response force time (which are strongly disputed by TVA), are not relevant to disposition of this case. Rather, the issue is whether the Complainant, Frank Smith, engaged in protected activity under the ERA by his support of Robert Brock.[7] However, as Mr. Smith seeks protection for his support of Mr. Brock's complaints, it is necessary to discuss, as background, the underlying complaint of Robert Brock.

With respect to Mr. Brock (Complainant's brief, pages 3-6), it is argued that he reported nuclear safety concerns beginning with a memorandum to Richard L. Thigpen, Chief of Nuclear Security at Watts Bar, dated March 31, 1987, which dealt with the subject: "Analysis of the Watts Bar Nuclear Plant Physical Protection System."

Mr. Brock testified that for licensing of a facility by the NRC, the training and qualification plan must be in place, and all the requirements committed to NRC in the physical security plan must be in place. At Watts Bar one of the requirements that had to be met was evaluation of the physical security plan under the EASI computer model (Tr. 25). He says that he was involved in actually running and conducting exercises at Watts Bar dealing with responses to such things as a terrorist attack. The information would then be fed into the computer model to provide a "probability of the security force interrupting the adversary action" (Tr. 26). He says that EASI stands for "Estimate of Adversary Sequence Interruption" and refers to a computer model (developed by Sandia National Laboratories, Albuquerque, New Mexico, in a contract with the Department of Energy) to which TVA has committed itself as part of its physical protection plan to the NRC (Tr. 32).

Mr. Brock testified that the term "protected area" is an area that is encompassed by a physical barrier. At the time in question, the protected area at Watts Bar and Sequoyah is a small protected area, containing vital equipment, which is necessary for the safe shutdown of the plant (Tr. 56). The protected area had previously been significantly larger, but was reduced in 1985, at an expense of several million dollars (Tr. 73, line 20). The reduced protected area had not been tested at Watts Bar, and that was their purpose to test it (Tr. 62). Mr. Brock did not feel the smaller protected area left enough room for the security officers to protect the facility (Tr. 57).

[Page 12]

Mr. Brock testified that the basic difference of opinion regarding "response force time" is in determining when the clock should stop. As defined by Smith and Brock, the clock stops "when the last member of the team, properly outfitted and armed, arrives at the scene" (Tr. 1067). According to Mr. Brock's understanding, it was TVA management's position that the clock stops "when the first security officer arrived at the scene of an alarm location" (Tr. 71). Thus, it was Mr. Brock's opinion that, given the reduced protected area and his definition of response force time, there was not sufficient distance between detection and the vital equipment (Tr. 72). By simulating an intrusion and measuring the "response force time," data was generated to be included in the EASI

(computer) model, to determine if the plant was secure. Mr. Brock believed that this problem was significant to licensing, as he understood that the EASI methodology had been committed to by TVA in the physical security plan (Tr. 73).

Mr. Brock states that he was required to teach 10 C.F.R Part 73, Appendix B and C (CX 1), as a part of his teaching at Watts Bar. He has also conferred with Mr. Harold A. Bennett at Sandia National Laboratories, who developed the EASI model, to confirm the meanings of terms such as "response force times," and when does "interruption" occur (Tr. 35-36). When he was given this assignment in 1986 to conduct these evaluations, Mr. Brock says there was some disagreement between himself and Bobby Radford, initially on the definition of terms, because of discussions Brock had with Frank Smith earlier about EASI (Tr. 49). Mr. Radford worked for Nuclear Security in Chattanooga, and had the task of having the EASI calculations done for Watts Bar for licensing, and had given Mr. Brock the EASI manual. It is because of his concern for these definitions that Mr. Brock says he called Sandia National Laboratories for clarification (Tr. 36).

When conducting the exercises in mid-December of 1986, Mr. Brock says he became personally concerned about the results that they were achieving, and asked Mr. Radford to come up (from Chattanooga) and look at what they were doing, but that he did not (Tr. 53). He says that with all the activities going on at that time, it was not until March 31, 1987, that he completed collecting all the data and wrote his report to Richard Thigpen, with his concerns[8] (Tr. 54).

After Mr. Brock submitted his March 31 memo, he testified that a meeting was conducted with Mr. Brock, Mr. Thigpen, Mr. Chattin, and Mr. Smith to discuss his concerns. It was at that meeting that the "nine significant elements, or areas that we should look into for Watts Bar" were identified (Tr. 50). (See also, Brock Tr. 3256-3261, and Smith Tr. 1077 and 3288-3289).

[Page 13]

Subsequently, Mr. Brock issued a memorandum on April 23, 1987, for Redford Norman, Acting Plant Manager, to W.R. Gillison, Chief Nuclear Security Branch, entitled: "Watts Bar Nuclear Plant (WBN) -- Analysis of the WBN Physical Protection System" (RX 33). It is argued that, generally, these memoranda raised the issue of whether or not Watts Bar Nuclear Plant could be adequately and properly protected in the event of an attack by terrorists intending to cause sabotage or damage to the nuclear plant or steal material or documentation therefrom.

Although the Brock (classified) memorandum, itself, is not available to the record, the nine significant elements of the Brock memorandum to Chief Thigpen are set out in the Norman memorandum. Clearly, these nine "significant elements" are concerns which relate to physical security of the Watts Bar Nuclear Plant. Further, the April 23, 1987, memorandum reports that a meeting to discuss the March 31, 1987, memorandum was held on April 13, 1987, between Mr. Brock, Chief Thigpen, Assistant Chief Chattin, and

Captain Smith (Complainant) (RX 33). Further, the Norman memorandum indicates that on April 22, 1987, the listed items were reviewed with W.L. Byrd, Acting Plant Superintendent, and Chief Thigpen. The Norman memo is addressed to W.R. Gillison and ends with "Your assistance is requested to schedule a meeting to discuss these issues and the supporting scenario data attached ... This memorandum was principally prepared by Lieutenant Brock (extension 8635)" (RX 33, p. 2).

The Respondent suggests that the Complainants actually "attached little importance" to the details of the April 13, 1987, meeting and notes that Mr. Smith considered the problems as "rather obvious." (Respondent's brief, page 29, citing Tr. 1076). This characterization is misleading, as Mr. Smith was asked,

> Q. When you discussed these matters with Mr. Brock, did you agree with his interpretation and analysis of the problem?
> A. Yes, it was rather obvious that there are problems with the power block configuration itself. (Tr. 1076 line 2).

Thus, contrary to the Respondent's suggestion, Mr. Smith clearly testified that he saw an obvious problem with the security configuration. Mr. Smith also had earlier testified that Mr. Brock was rather concerned not only about the security of Watts Bar Nuclear Plant, but that of Sequoyah Nuclear Plant as well, and was asked,

---

[Page 14]

> Q. Why would something at Watts Bar possibly have application to Sequoyah?
> A. Not only are they considered sister units in the fact that many parts of the systems can be considered mirror systems, or not mirror, but similar systems to the point of EASI recognition from one plant to another, the barrier configuration and the protected area and vital area definitions were very much the same from one site to the other. (Tr. 1075, lines 15-23).

Respondent further suggests the insignificance attached by the Complainants to this matter by noting that, "In fact, Brock refused to state what Chief Thigpen's response to his unique definition of response force time (Respondent's brief at page 29). Again this suggestion is misleading, as Mr. Brock testified that, "I don't think I should say what his position on it was" (Tr. 247). (Emphasis added) Although no further explanation was given at the hearing for this statement, it was my understanding, at the time, that he felt he should not reveal this information as it might reveal "Safeguards" classified information. Looking back at this testimony in the transcript, I believe it is also possible that Mr. Brock might have been concerned with repeating hearsay. In any event, I find that his statement clearly does not indicate that he or Mr. Smith considered these matters as insignificant.

Mr. Brock testified that his March 31, 1987, memorandum was discussed in a meeting between he and Thigpen, Chattin, and Smith, and that there were nine significant elements, of which eight were issues which would have generic application for the Sequoyah Nuclear Plant. He stated that Chief Thigpen decided that they would take these

nine issues to the senior plant manager at Watts Bar, Wes L. Bird, for discussion (Tr. 58, 59). Further, Brock testified that, after discussion with Mr. Bird, he was directed to prepare a memorandum for W.R. Gillison requesting a meeting to discuss these concerns (Tr. 59). Mr. Brock was then asked,

> Q. Now, at that time did you then prepare a report for the plant manager to send to Mr. William R. Gillison?
> A. Yes sir, I prepared that report.
> Q. Was the plant manager at that point by the name of Redford Norman, Jr.?
> A. Yes, sir. Mr. Bird had directed me to prepare, that given the

---

[Page 15]

> significance of the issues that were identified, that it would be best for that signature to go out from the senior plant manager, and that was Radford Norman who was acting as plant manager in Eddie Ennis' absence. (Tr. 59, lines 15-25).

Respondent also argues that "Nowhere in Brock's invitation, introduced into evidence as RX 33, did he give the slightest hint that the security items suggested as the 'initial agenda' were his individual concerns." Thus, it is argued that Mr. Gillison had no reason to believe that anything other than an institutional response was required and is, therefore, insufficient to establish that corporate management was aware that Brock had a nuclear security concern and was engaged in activities protected by the ERA. (Respondent's brief at pages 29 and 30).

Even without seeing the content of Mr. Brock's classified memorandum, this argument by the Respondent is rejected as implausible and not supported by the facts. Indeed, the memorandum (RX 33), begins in the first paragraph by stating, "On April 13, 1987, a meeting was conducted to review the content of the attached memorandum from Robert D. Brock to Richard L. Thigpen, etc. (emphasis added). The memo then proceeds to list the nine significant concerns of the Brock memo. Further, the memorandum ends with a last line, located after everything else on the page, including Mr. Redford Norman, Jr.'s, signature, in the center of the page, as follows:

> *This memorandum was principally prepared by Lieutenant Brock (extension 8635).*

Contrary to the Respondent's argument, I find that it is clear that the "significant elements" of the March 31, 1987, Brock memorandum, as noted in the April 13, 1987, Norman memorandum (RX 33), are obviously concerns of Mr. Brock (whether valid or not) which relate to physical security of the Watts Bar Nuclear Plant. As such, this Brock memorandum is protected activity under the ERA.

Mr. Brock testified that when no response was received to these memoranda, a meeting, was held in October 1987 between W.R. Gillison, John Estes, and himself; and that during that meeting he raised his concerns relative to the defense and security of the Watts Bar Nuclear Plant, the application of EASI, and the more detailed issue of response force time (Tr. 62-67; CX 2).

The Respondent suggests that Mr. Brock was "unable to explain why he suddenly became anxious for a discussion of his "agenda" in September 1987,"

---

and notes that "Brock testified vaguely that he was afraid the NRC would permit Sequoyah to restart in an unsafe condition." (Respondent's brief at page 32 and footnote 14). 1 disagree. Mr. Brock clearly explained his anxiousness and clearly expressed his concern regarding the Sequoyah restart.

Mr. Brock clearly testified that, "The issues raised in this March 31, 1987, memo were significant enough to me that before TVA would consider restarting it, Sequoyah, that these issues would be addressed" (Tr. 64, lines 6-9). He notes that when the April 23, 1987, memo (DX 33), was issued, Sequoyah Unit 2 had not been restarted, and "So if anything, we felt a little bit comfortable with the report being sent to Chattanooga and being reviewed. Comfortable in that we did not feel that TVA would restart its nuclear facility with a report being submitted that questioned our ability to protect a TVA facility with the reduced protected area" (Tr. 62, lines 6-13). Later he testified that, "About five months had passed since the memo was submitted. There was more and more pressure being applied to get Unit 2 restarted. There was a lot of talk about it going back on line" (Tr. 63, lines 23-25 and 64, line 1).

The record also contains the notes of Don Hatton of TVA Employee Concerns, documenting an August 8, 1987, call from Mr. Brock regarding the response time issue, and what Mr. Brock believed was an "attempt to cover up the seriousness of the weakness in the security program" (CX 50, 51, 52, 53, 54, 55; Tr. 1365-1375).

Further, the document admitted as CX 2 (dated October 16, 1987), is a draft memo which Mr. Brock says he asked Eddie R. Ennis, Plant Manager, to send to Mr. Gillison to again ask for a response to address these issues. Mr. Brock testified that Mr. Ennis declined to send the memo because it contained the words, "Your assistance is again requested to insure that adequate security measures are in place to protect this facility and to consider security measures common with Sequoyah Nuclear Plant that may impact its start-up." Mr. Brock stated that Mr. Ennis told him that because it contained the words "may impact Sequoyah restart," he preferred to call Mr. Gillison personally (Tr. 66; CX 2). 'Mr. Brock says he was then asked to leave the room, and was informed on October 22, 1987, to report to Chattanooga on the next day, October 23rd, to Mr. Estes' office to discuss his concerns (Tr. 67).

The meeting took place on October 23, 1987, in Mr. Estes' office in Chattanooga, and included Robert Brock, W.R. Gillison, Sam Griffin, and John Estes. Brock says the meeting lasted about three hours and that he was allowed to fully air his concerns (Tr. 67-77). In the meeting Mr. Gillison

---

[Page 17]

was Chief of the Nuclear Security Branch, and was the senior corporate manager in attendance (Tr. 68). He did not recall Mr. Griffin's position, but that all in attendance were probably at the level of M-6 (Tr. 68). During the meeting, Brock says Gillison did not understand what the acronym (EASI) was (Tr. 69), and that Mr. Griffin and Mr. Estes took the same position with regard to EASI as Bobby Radford had (Tr. 71).[9]

At the conclusion of the October 22nd meeting, Mr. Brock says that, "I felt resistance to common sense discussion of the issue. I felt that they were being firm in their position and that there was no latitude for discussion" (Tr. 74). He says that he had asked to see the Sequoyah nuclear plant's EASI evaluation, but that Mr. Griffin was unable to locate them; and that Mr. Gillison "committed to me that those documents would be located and that they would be forwarded to me within a short period of time" (Tr. 74). He says his interest in those documents was to see how Sequoyah had interpreted the terms, and to see the actual times at Sequoyah for response force times, "and how logical they were given the definition that Bobby Radford told me to use" (Tr. 75). Mr. Brock further says that Mr. Gillison committed that they would re-evaluate conducting the EASI exercises at Sequoyah given this question about the propriety of it (Tr. 76).

Mr. Brock alleges that the commitments from Mr. Gillison were not kept. He says he was not given access to the Sequoyah EASI records. Mr. Brock also maintains that Mr. Gillison also agreed to document the issues discussed in the meeting and forward them to Mr. Thigpen, which was not done. Further, he says his March 31st report was not taken to Sequoyah for generic application (Tr. 76). Finally, Mr. Brock says that he advised Mr. Gillison in the October 22nd meeting that he would not restart Unit 2 Sequoyah if he were in Mr. Gillison's shoes (Tr. 77).

Again, the issue is not whether Mr. Brock was correct in his concerns, but that they related to plant security and that he expressed them to TVA management. While TVA strongly disputes the validity of the concerns, there is clear evidence from the Complainant that they occurred. Therefore, I find that Mr. Brock's August 8, 1987, call to Employee Concerns, his discussions with Mr. Ennis on October 16, 1987, the draft memo in CX 2, his meeting with management on October 23, 1987, and his alleged statement to Mr. Gillison about Sequoyah restart, are also protected activities under the ERA.

Similarly, I find that Mr. Brock's memorandum on February 18, 1988, to Richard A. Hardin, Supervisor, Nuclear Security Training Center, Cleveland,

---

[Page 18]

Tennessee, with copies to Estes, Gillison, and Thigpen, is also protected activity under the ERA (CX 3; Tr. 79-83).

Mr. Brock testified that he was assigned by Frank Smith to participate in a Quality Assurance audit between February 22, 1988, through March 1, 1988, at the Sequoyah Nuclear Plant, dealing specifically with nuclear security issues (Tr. 86, 253). During this audit he testified that he received a copy of the Sequoyah EASI evaluations from his Sequoyah counterpart, Jacky Biggerstaff (Tr. 88). Mr. Brock says that, "As I read the data the response force time was indicated when an officer arrives on the scene. It also had some very short, from my perspective, unrealistic response force times recorded" (Tr. 88, lines 7-9). Further, Mr. Brock says that the information included the raw data for the report and a document from Bobby Radford which described the computer calculations of the data, which he reviewed, saying, "In this review I determined that there were data inconsistencies between the information that William Daniels had provided, and the data that Bobby Radford had included in his computer calculations" (Tr. 88, lines 15-18). He explained that what that meant to him, was that,

> What we mean here is the times that were plugged into the computer were shorter on two occasions than the times that had been provided by Mr. Daniels, which is where we come up with data inconsistencies. The data that was provided versus the data that was plugged in the computer was different. (Tr. 88, lines 21-25; Tr. 89, line 1).

Mr. Brock also stated that during the audit he learned that the commitments made by Mr. Gillison (in his view) during the October 23, 1987, meeting had not been kept in that there had been no discussion at Sequoyah over the issues raised in his March 31 memo (Tr. 90).

As a result, Mr. Brock testified that he went on March 8, 1988, (seven days after the Sequoyah audit) to the Employee Concerns office at TVA Watts Bar Nuclear Plant to discuss his concerns (Tr. 91). The March 8th meeting was conducted by John Rollins, Employee Concerns Manager. Also present were Mr. Brock, Mr. Smith, Mr. Estes, and Jeff Rogers, who Mr. Brock says was a subordinate of Mr. Gillison. Mr. Brock testified that he later learned, during Mr. Gillison's discovery deposition, that Mr. Rogers had been assigned to follow up on Brock's EASI concerns (Tr. 91). Such is also supported by the notes of Mr. Rollins regarding his March 3, 1987, telephone call from Mr. Brock, as a result of which the March 8 meeting was scheduled (CX 57). Mr. Rollins' notes indicate that the specifics of Mr. Brock's call were Safeguard classified, and therefore not documented. His notes do indicate that Mr. Brock advised of his memo and nine items; that the meeting was held to discuss these; that these matters were to be presented to

---

Sequoyah for generic applicability determination; that during a recent visit to Sequoyah, Mr. Brock learned that had not been done; and, that Mr. Brock had observed the same issues at Sequoyah as he had identified at Watts Bar, except for number two (CX 57).

Again, the issue is not whether Mr. Brock was correct in his concerns, but that they related to plant security and that he expressed them to management. While TVA strongly disputes the validity of the concerns, there is clear evidence that they occurred. Therefore, I find that Mr. Brock's expression of concerns to Employee Concerns, by telephone on March 3, 1988, resulting in the March 8, 1988, meeting are protected activities under the ERA.

Having found that Mr. Brock's actions are considered protected activity under the ERA, it must be determined whether Mr. Smith's involvement in those activities and his support of Mr. Brock are protected under the Act.

Mr. Smith testified that he served as Administrative Captain from December 1984 to March 1988 (Tr. 1069), and that he reported directly to Chief Thigpen (Tr. 1070). Mr. Smith says that in 1987 he was aware of Robert Brock's concerns regarding EASI, as Mr. Brock spoke to him on numerous occasions, either separately or in the presence of Dan Chattin or Chief Thigpen (Tr. 1074). He testified that they discussed the matter numerous times, including the possible application to Sequoyah (Tr. 1075), and that he was aware of the March 31, 1987, memo and attended the staff meeting where it was discussed (Tr. 1077). Mr. Smith says that during the summer of 1987 he encouraged Mr. Brock to give corporate security in Chattanooga time to respond to his concerns as there were a lot of new people coming into the organization (Tr. 1078). He says that, "Had Sequoyah been in an operating status the answer would be far different" (Tr. 1078, lines 19-20).

Mr. Smith testified that it became critical when he was asked to participate in the Sequoyah Operational Readiness Review (SORR) Team at Sequoyah Nuclear Plant on February 22, 1988 (Tr. 1079, 1083). Regarding SORR, Smith said, "Well, the S.O.R.R. was similar to the regular operation readiness review in that it was to give TVA's upper management an indication of Sequoyah's readiness for restart, going back into a licensed condition, and from this standpoint, obviously, it was testing and evaluating the security system, itself" (Tr. 1085). His activity during the SORR was auditing records, looking at security management, effectiveness, etc. Smith was asked to what extent he looked into the EASI methodology application at Sequoyah. He responded that he looked to find records to satisfy that Sequoyah was adhering to its plan commitments on the EASI calculations and the conduct of drills, but did not find such records (Tr. 1089). Smith says

---

he also found that the assistant chief, J.T. Thomas, and all the training staff were unfamiliar with EASI at Sequoyah (Tr. 1090).

Complainant Smith has argued that his support of Mr. Brock in his concerns is protected activity under the ERA (Complainant's brief, page 5). Mr. Donald Hickman testified he works as Department Manager for Nuclear Investigations, under the Office of the Inspector General for TVA (Tr. 1606). Mr. Hickman testified that he had occasion to investigate a "Request for Investigation" made on July 12, 1988, by Frank Smith, Chief,

Site Security, Protective Services, Watts Bar Nuclear Plant, to Norman A. Zigrossi, Inspector General (CX 93; Tr. 1608-1614). This request by Mr. Smith directly relates to Mr. Brock's concerns regarding the Sequoyah E.A.S.I data and calculations and attaches a copy of Mr. Brock's July 11, 1988, memo to Mr. Smith (CX 93), and stated as follows:

> The referenced memorandum identifies an area which may have an impact on the operability of Sequoyah Nuclear Plant. Additional classified reference material, available at Watts Bar Nuclear Plant, may be provided to assist you in understanding this problem and other security deficiencies.
> Due to the urgent nature of the deficiencies which have been identified, and with no assurance that adequate resolution has occurred, I request that a meeting be scheduled to discuss these issues at your earliest convenience. (CX 93).

The Respondent has argued that TVA management was not aware of his support of Mr. Brock (Respondent's brief at page 50). Mr. Hickman testified that he knew Mr. William R. Gillison and had occasion to talk to him as a routine part of his job about once per week (Tr. 1614). He specifically recalled talking to Mr. Gillison prior to August 5, 1988, about Mr. Brock's concerns regarding physical protection systems at Watts Bar (Tr. 1615-1618). It is not entirely clear from Mr. Hickman's testimony that he talked to Mr. Gillison about Mr. Smith's involvement in the Brock concerns. However, in view of the timing of the conversations he testified to with Mr. Gillison, it is difficult to see how Mr. Gillison could not at least have known of Mr. Smith's July 12, 1988, request for investigation.

However, whether management was aware of Mr. Smith's actions is an issue to be considered in determining whether there is evidence of retaliation. Clearly, his support of a subordinate who is engaged in protected activity is, itself, protected activity under the ERA.

In the SORR findings a written report was issued.[10] Mr. Smith says

---

that he wrote his findings, and that his portion of the report was submitted to TVA (Tr. 1095). Mr. Smith was unable to give the specifics of the deficiencies he noted for Safeguards reasons (Tr. 1096), but testified that he raised three or four deficiencies (Tr. 1097), and that these deficiencies were the only ones noted in the SORR (Tr. 1098). Mr. Smith testified that Jeff Rogers was his sub-team leader (Tr. 1 100). At the conclusion of the SORR there was an debriefing with Mr. McCloskey, Mr. Estes, Mr. Gillison, Mr. Rogers, Glen Turney, Wayne Tillson, Kathy Masters, Dave Moore, and others (Tr. 1102), during which Smith presented his deficiencies. A deficiency meant that there was an item as to which TVA was out of compliance with regulations and, in all probability, would require that the agency report to the NRC (Tr. 1270). In presenting these deficiencies, Smith testified that,

> In the areas of either barrier deficiency or proximity problems of open areas to vital areas, that was one of my greatest concerns and it's still a great concern, was on a vulnerability statement that I made at the close of my overall report, and that had to do with the configuration of the power block, itself, and I really can't go into great detail other than to say that unless something drastic has changed that problem is still there. There's a great problem there. (Tr. 1103, lines 21-25, 1104, lines 1-4).

Regarding the SORR deficiencies noted by the Complainant, it is unclear whether the Respondent contends such is protected activity or not. Instead, the Respondent argues that TVA's nuclear security managers did not interfere with Mr. Smith's expression of nuclear security concerns, and that TVA's nuclear security management had no motive to retaliate against Smith on the basis of his SORR findings (Respondent's brief at page 52). However, this argument goes to the issue of whether TVA retaliated against Mr. Smith as opposed to the issue of whether his actions relating to the SORR are protected under the ERA. In any event, I find that Mr. Smith's findings and report regarding deficiencies he found during the SORR are also protected activities under the ERA.

Retaliation

The Complainant has argued that he was the subject of retaliation for his protected activities by his inclusion in the RIF and by his failure to be selected for the position of Site Security Manager at Watts Bar Nuclear Plant. I will address these matters in that order.

September 30, 1988, RIF

[Page 22]

The Complainant was given a notice of reduction-in-force on August 2, 1988, as a part of a massive reduction by TVA effective September 30, 1988. The United States Court of Appeals for the Sixth Circuit, where this case arises, has held that in establishing a *prima facie* case an employee terminated during a RIF carries a greater burden of supporting charges of discrimination than an employee who was not terminated for similar reasons. See, *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986). Under such circumstances, an employee discharged during a RIF "must come forward with additional direct, circumstantial, or statistical evidence that age was a determining factor in his termination." *Id*.[11]

Although the Complainant did raise questions about the propriety of the preparation of the list on which his name appeared for the RIF, I find that the evidence is not sufficient to meet the greater burden of proof set out in *Ridenour*, that his inclusion in the RIF was motivated by his protected activities.

Site Security Manager

The Complainant maintains that he was not selected for the position of Site Security Manager at Watts Bar Nuclear Plant because of his protected activities. At the time the position was filed, Mr. Smith was Acting Site Security Manager. To establish the Respondent's wrongdoing, the Complainant has argued that the vacant position announcement (VPA) issued in September 1988 (CX 91), appears to have been written for Richard Hardin who was ultimately selected as Site Security Manager. This description, when compared to the May 1988 description (CX 92), clearly shows that the two are virtually identical, except for a highly significant experience requirement.

The May 1988, description (CX 92), under the heading of "Qualifications:" provides as follows:

> A B.S. or B.A. in Criminal Justice/Security Administration or equivalent. *A minimum of seven year's experience in managing security systems or programs, three of which have been in a supervisory role with control over a minimum of 100 individuals.* (Emphasis added).

The September 1988, description (CX 91), under the same heading of "Qualification:" provides:

[Page 23]

> B.S. or B.A. in criminology or Security Administration, or equivalent. Requires extensive knowledge of theory and concepts relating to nuclear security services and industrial complex protection. Skilled in observing possible security threats and solutions, make complex decisions under emergency conditions, schedule, coordinate, and manage the activities of personnel at various onsite locations, establish cooperation, and manage activities to accomplish tasks, and communicate effectively in writing and orally. *Eight years' experience in the area of nuclear, industrial, or security forces, including at least five years responsible nuclear security supervision experience*. (Emphasis added).

Clearly the two management experience requirements are distinctly different. The Complainant argues that he possessed the necessary experience requirement expressed in the earlier description, while Mr. Hardin did not. Indeed, Richard Hardin testified that he did not have a minimum of seven years experience in managing security systems or programs (Tr. 2556), and that he had never supervised up to a hundred individuals (Tr. 2562).

The vacant position announcement for the Site Security Manager's job was also suspiciously posted for only a brief period. Sharon Moore testified that she was employed as the lead clerk in the security section and had been secretary to the manager of site security at Watts Bar while the position was held by Rick Parker, Frank Smith, and now, Richard Hardin (Tr. 1535- 1536). Mrs. Moore testified that the VPA (CX 91), was received by her office for posting on September 12th and that the advertisement also closed on the same day (Tr. 1563). Yet, Richard Hardin testified that he received the

announcement by mail at the training center in Cleveland, Tennessee, two days before the deadline on the application (Tr. 2536, 2563).

Further, the position appears to have been advertised without following existing TVA policy regarding the filling of new positions. By memo issued April 29, 1988, an employment freeze was imposed by J. Scott Shaffer, head of personnel services at Watts Bar at the time (Tr. 1579; CX 90). The freeze imposed by Mr. Shaffer provided that any new positions would require approval of a "Request to Advertise Position," and that "...justification must be provided that demonstrates that the position is required for restart or recovery activities and that the duties cannot be performed by, or distributed to, existing employees" (CX 90). At the time that the position of site security manager was filled, Mr. Smith was already acting in the same capacity. The record contains no evidence that the Shaffer memo and freeze (CX 90), had been lifted; nor is there evidence that a "Request to Advertise Position" had been approved.

These factors must be considered in light of the timing of Mr. Smith's July 12, 1988, request for investigation made to the TVA Inspector General

---

(CX 93). The clear inference is that the whole procedure for advertisement and selection of Mr. Hardin as the Site Security Manager at Watts Bar was pretextual, and that the Complainant's persistence in supporting Mr. Brock's concerns was a factor in his failure to be retained as Site Security Manager at Watts Bar. I find that this evidence is sufficient for the Complainant to establish a *prima facie* showing to support the inference that his protected activity was a motivating factor in TVA's selection of Mr. Hardin instead of the Complainant. Once this is established, the burden shifts to the Respondent to demonstrate that the same action would have been taken even in the absence of the protected conduct. See, *DeFord, supra*, citing *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982), and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

In support of TVA's actions, Mr. Gerald Shilling testified that he prepared the job description upon which CX 91 is based (Tr. 2920), and that at the time he was working with Mr. McCloskey and Mr. Gillison (Tr. 2921). Shilling testified further that he suggested the changed language which eliminates the requirement that an applicant had supervised a minimum of 100 people because it was too limiting (Tr. 2930).

However, Mrs. Sharon Moore testified that she did not know who prepared the September announcement (CX 91), but that Mr. Gerald Shilling told her it did not come out of his office (Tr. 1587). According to Mrs. Moore, it would have been expected to be generated in Mr. Shilling's office, as he was protective services human resource officer, and that such would normally be issued by that office (Tr. 1588). She further testified that she called "Gerald the, day it came in because we got it the same day it closed. He said that it did not come out of his office. That he didn't know where it had been during that

this period of time. I'm assuming it had been out a few days since it closed the day we got it" (Tr. 1587). Yet Mr. Gillison testified that it was Mr. McCloskey who posted the vacancy announcement for the permanent site security manager's position in early September 1988 (Tr. 1825). In considering this apparently conflicting evidence from Mr. Shilling and Mrs. Moore, I don't necessarily see these statements as entirely inconsistent. It is at least conceivable that Mr. Shilling was talking about explaining the lateness of the VPA issuance as opposed to its content.

In any event, the issue to be considered here is whether the Respondent has articulated a legitimate nondiscriminatory explanation for the problems surrounding the Site Security Manager vacant position announcement.

As indicated, Mr. Shilling claims credit (with help from Mr. McCloskey and Mr. Gillison) for authoring the changes in the announcement as they

---

relate to the requirement of supervising a minimum of 100 individuals. More significantly, Mr. Shilling does not claim credit for the change from "A minimum of seven years' experience in managing security systems or programs" as in the May 1988 description (CX 92), to "Eight years' experience in the area of nuclear, industrial, or security forces" as in the September 1988 description (CX 91). This change is particularly significant as Richard Hardin testified that he did not have a minimum of seven years' experience in managing security systems or programs (Tr. 2556). Thus, Mr. Hardin could not have qualified for selection under the earlier VPA.

Mr. Shilling does not explain, and indeed the Respondent's evidence does not give an explanation for this major change in the VPA. In the absence of such explanation, I find that the evidence establishes that the September 1988 vacant position announcement was unlawfully tailored to allow Mr. Hardin to qualify and be selected as Site Security Manager at Watts Bar instead of the Complainant, who was then the Acting Site Security Manager. Respondent also does not explain why the position was advertised without following the Shaffer memo regarding approval of a "Request to Advertise Position."

Further, I find that the motivation for this action was, at least in part, the serious questions raised by Mr. Brock and Mr. Smith regarding the Watts Bar protected area, which could have impacted upon the restart of the Sequoyah Plant, as documented in Mr. Smith's July 12, 1988, complaint to Norman A. Zigrossi, TVA Inspector General (CX 93). The assertions of the Respondent that Mr. Gillison, Mr. McCloskey, Mr. Rogers, and others that they were not aware of Mr. Smith's support for Mr. Brock, or his SORR concerns or the July 12, 1988, complaint to TVA's Inspector General are simply not credible.

As such, I find that the Complainant, Frank Smith, has been unlawfully discriminated against by TVA as a result of activities protected under the ERA.

DAMAGES

Because I have found that the Complainant was unlawfully discriminated against as a result of protected activities under the ERA, he is entitled reinstatement to the position of Site Security Manager, Watts Bar Nuclear Plant, and to recover back pay with interest, compensatory damages, attorney's fees, and costs and expenses reasonably incurred by the Complainant in the bringing of the complaint.

The back pay award shall comprise the Complainant's reasonably

---

projected compensation had he been selected and remained in the position of Site Security Manager, less any compensation received as the result of substitute interim employment. The period for computing back pay shall run from September 26, 1988, the date of the selection of the Watts Bar Site Security Manager, to the date that the Complainant is reinstated to the position of Site Security Manager, Watts Bar Nuclear Plant.

Compensatory damages shall include all reasonable expenses which the Complainant has incurred as a result of his failure to be selected to the position of Site Security Manager on September 26, 1988, until the date he is reinstated to that position. Such expenses shall include, but are not limited to, expenses associated with travel to and from his place of interim employment and additional living expenses; loss of TVA benefits, including medical expenses incurred due to loss of insurance coverage; and, medical expenses incurred as a result of stress relating to his discharge from employment.

RECOMMENDED ORDER

It is hereby Ordered that:

1. Respondent TVA shall immediately reinstate Complainant Frank C. Smith to the position of Site Security Manager, Watts Bar Nuclear Plant.
2. The Complainant shall submit, in writing, within 20 days of this Decision an Itemization of Damages, including back pay with interest, compensatory damages, attorney's fees, and costs and expenses, which he claims are due from the Respondent. Following submission of the Complainant's Itemization of Damages, the Respondent shall file a response, in writing, within 20 days. Thereafter, a Supplemental Decision and Order will be issued to determine the exact amount of damages.

Entered this the 1st day of October, 1991, at Cincinnati, Ohio.

Richard E. Huddleston
Administrative Law Judge